



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 25, 1994

Mr. Ronald J. Neiman
Neiman & Barnes
P.O. Box 777
Lewisville, Texas 75067

OR94-677

Dear Mr. Neiman:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27486.

The City of Lewisville (the "city") received a request from a reporter for a copy of a feasibility study. Your letter states:

Several months ago it became publicly known that the City of Lewisville and other public and private entities have been in contact with the Dallas Mavericks NBA basketball team concerning the possibility of relocation of the team to a new sports arena which might be constructed within the City. . . . During the course of negotiations, an initial feasibility study for such a sports arena has been authorized

You have submitted to this office as responsive to the request a draft version of the study. You contend that the draft is excepted from disclosure under sections 552.022(1), .101, .104, .105, and .110 of the Government Code.

You contend that section 552.022 of the Government Code provides an "exemption" from disclosure for the draft because it is not in final form. Section 552.022 provides examples of types of public information that are subject to disclosure to the public. Included as examples of public information are completed reports, audits, evaluations and investigations made of, for, or by a governmental body. Gov't Code § 552.022(1). We note, however, that a document may be public information even if it is in a draft version rather than completed form. Open Records Decision No. 407 (1984) at 3.

Section 552.021(a) of the Government Code defines "public information" as information that, under a law or ordinance or in connection with transactions of official business, is collected, assembled or maintained (1) by a governmental body, or (2) for a governmental body when the governmental body either owns the information or has a right of access to it. Chapter 552 of the Government Code does not authorize the withholding of such information from the public unless it falls within a specific exception listed in the chapter. Gov't Code § 552.006; Open Records Decision No. 363 (1983). Thus section 552.022 does not provide an exception from disclosure for the study simply because it is in draft rather than final form. Open Records Decision No. 407.

You argue that the feasibility study is protected from disclosure under section 552.104 because release of the study would interfere with the city's competitive interests in the marketplace:

It is public knowledge that the City of Dallas has also authorized a feasibility study about a new sports arena to be located therein, and the City of Irving and others have also announced an intent to pursue the possibility of building a sports arena to lure the Dallas Mavericks and/or the Dallas Stars hockey team Thus, the information contained within the report would harm the City of Lewisville's market place interests, and the revelation of information therein would be of benefit to the competing cities.

Section 552.104 is designed to protect governmental interests in commercial transactions. Open Records Decision No. 593 (1991) at 2. Generally, section 552.104 protects a governmental body's interests in relation to a competition in which third parties are bidding to contract with the government. Open Records Decision No. 592 (1991) at 4. This office has acknowledged, however, that under certain circumstances a governmental body might have commercial interests that would be protected under section 552.104. Open Records Decision No. 593. However, a governmental entity must demonstrate that it has specific constitutional and statutory authority to engage in marketplace competition before it can claim the "competitive advantage" aspect of section 552.104. Open Records Decision Nos. 604 (1992); 593 at 4. Since the city does not appear to have such authority to engage in competition in the marketplace, the study may not be withheld under section 552.104.

You contend that the study is protected from disclosure by sections 552.101 and 552.110 of the Government Code because the study contains financial information about the Dallas Mavericks. Section 552.101 excepts from public disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." The financial information in the feasibility study is not protected by statute. Section 552.101 also protects common-law privacy interests. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 328 (1982). However, there is no common-law privacy

interest in financial information about a business. Open Records Decision No. 192 (1978) at 4 (right of privacy protects the feelings of human beings, not property, business, or other monetary interests). The feasibility study is thus not excepted from disclosure under section 552.101.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2. As we have previously indicated, financial information about a business is not protected by statute or the common law of Texas. The common law of Texas at present recognizes no doctrine, other than that of trade secret, that has been asserted as a basis for invoking section 552.110. See Open Records Decision No. 592. This office will accept a claim that information is excepted from disclosure under section 552.110 as a trade secret if a prima facie case is made that it is a trade secret, and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592. You do not argue that this report is a trade secret under section 552.110.

As provided by section 552.305 of the Government Code, this office provided the Dallas Mavericks the opportunity to submit reasons as to why the draft feasibility study should be withheld from disclosure. The attorney representing the Dallas Mavericks asserted that the report should be withheld "because it contains confidential past and present financial history of the Club" and that release of the study would be an unwarranted invasion of privacy. However, as previously discussed, the financial information revealed by the study is not confidential and the attorney did not argue that the study contained trade secrets. Therefore the study may not be withheld from disclosure under section 552.110.

You also seek to withhold the study from public disclosure pursuant to section 552.105 of the Government Code. Section 552.105 provides an exception from disclosure for information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

This exception protects a governmental body's planning and negotiation position with respect to particular transactions. Open Records Decision No. 357 (1982). Section 552.105 is applicable not only to particular appraisal reports and purchase pricing for real estate, but also to information that pertains to such reports and pricing. Open Records Decision No. 564 (1990). You state that the news media "revealed a potential site to be somewhere near the Vista Ridge Mall area" but do not indicate that the city has released

information about a potential site or sites. The draft study shows that Lewisville is under consideration as the site for the proposed sports arena. To the extent that the proposal reveals information about specific land sites for development of the proposed sports arena, this information may be withheld. We have marked the information that may be withheld under section 552.105. We note, however, that if the city releases information about specific land sites, it may not withhold that information in the study.

You may withhold from disclosure to the public the information that we have marked. The rest of the draft feasibility study must be released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/SG/rho

Ref.: ID# 27486

Enclosures: Marked document

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